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Reply Brief of Plaintiff in Error

THIRD ORAL ARGUMENT.

Filed Nov. 10, 1898.

THE UNITED STATES OF AMERICA.

In the Supreme Court of the United States.

OCTOBER TERM, 1898,

No. 15.

October Term, 1897, No. 194.

October Term, 1896, No. 551.

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,
Counsel for Plaintiff in Error.

JONES & JAMES, Attorneys.

(16,330).

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THE UNITED STATES, *Defendant in Error.*	No. 551. (16,330)	Oct. Term, 1896.

Reply Brief of Plaintiff in Error on Third Oral Argument

MAY IT PLEASE THE COURT:

The learned Assistant Attorney-General and District Attorney, counsel for the United States, defendant in error, have filed an elaborate brief upon the question directed to be re-argued, and many other subjects. In reply thereto, we respectfully submit the following brief, to wit:

I.

SMUGGLING DEFINED.

(1.) **Rev. Stat. (2d Ed.), Sec. 2865 is, and is to have the same meaning as, Sec. 19 of the Act of August 30, 1842 (5 Stat. 548, 565).— *Post pp. 2-5.***

(2.) The Act of February 27, 1877 (19 Stat. 240, 247) had for its sole object the correction of errors and the supplying of omissions in the text of Sec. 2865, Rev. Stat., and other sections, as its title indicates, and as its first section provides, so as to make the same truly express the statutes in force on the first day of December, 1873, and is in no respect new legislation, nor a new law enacted to take effect from the date of its passage, and its intention is to make Sec. 2865 read as it ought to have read in the printed volume of the Revised Statutes, in the shape in which it was in force on the first day of December, 1873, as Sec. 19 of the Act of August 30, 1842 (5 Stat. 548, 565,)— *Post pp. 2-5.*

(3.) The word "smuggle" is a technical word, having a known, accepted, and defined meaning at common law. When Congress, August 30, 1842, enacted a statute containing the word "smuggle" in Sec. 19 (5 Stat. 548, 565), it thereby adopted the common-law definition as the same is found in the treatises on the common law, and that definition is as necessarily included therein as much as if it stood in the text of the Act. Congress thereby made that common law a Federal Statute, and it derived its force and effect from that statute.— *Post pp. 5-13.*

(4.) Non-legal definitions of smuggling, which use the words import or export in a non-legal sense, do not define the offense of smuggling, and are not definitions thereof in a legal sense, and cannot be used to define the word smuggling found in a statute punishing that offense.— *Post pp. 13-20.*

(a). Rev. Stat. (2d. Ed.), Sec. 2865 is, and is to have the same meaning as, Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565).

As we have already shown (our brief, pp. 6–8) Rev. Stat.,

(2d. Ed.) Sec. 2865, is Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565). Because the part of Sec. 19 punishing smuggling was inadvertently omitted from the Federal written law between June 22, 1874, and February 27, 1877 (our brief, p. 8), it is contended that on its restoration a new meaning is to be given the same language (their brief, p. 42). A similar contention was unsuccessfully made in *United States vs. Auffmordt* (1877), 122 U. S., 197, 210. It was thus disposed of by *Mr. Justice Blatchford* (p. 210):

"But we are of opinion that the amendment made by the Act of February 18, 1875 [18 Stat., 316, 318] was similar to the Act of February 27, 1877, 19 Stat., 240], did not have the effect contended for. *Its sole object was to correct errors and supply omissions in the text of the Revised Statutes, as its title indicates, so as to make the same truly express the statutes in force on the 1st of December, 1873*, and it made special reference to the printed volume of the Revised Statutes. *It was in no respect new legislation; nor a new law enacted to take effect from the date of its passage*, in such wise as to alter any enactment made since the passage of the Revised Statutes. *The intention was to make Sec. 2864 read as it ought to have read in the printed volume*, in the shape in which it was in force on the 1st of December, 1873, as a part of Sec. 1 of the Act of March 3, 1863, c. 76, 12 Stat., 738. It left the Act of June 22, 1874, c. 391, to have its full effect in respect to Sec. 2864, in like manner as if the words 'or the value thereof' had been contained in that section, in the printed volume of the Revised Statutes. There was a law in force on December 1, 1873, and subsequently thereto, down to June 22, 1874, authorizing a forfeiture of the value of merchandise for the causes stated in the Sec. 2864, and the fact that forfeitures of such value might have been incurred during the intervening period between December 1, 1873, and June 22, 1874, was a sufficient reason for the correction made in Sec. 2864."

This court thus disposed of the precise question here presented.

The opinion of the trial court was to the same effect. *United States vs. Auffmordt* (1884), 19 Fed. Rep., 893.

In *McDonald vs. Hovey* (1884), 110 U. S. 619, *Mr. Justice Bradley* said (p. 629), that:

"Upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology."

In *United States vs. Ryder* (1884), 110 U. S., 729, *Mr. Justice Bradley* said (p. 740), that:

"It will not be inferred that the Legislature, in revising and consolidating the laws intended to change their policy, unless such intention be clearly expressed."

In *United States vs. Le Bris* (1887), 121 U. S., 278, *Mr. Chief Justice Waite* said (p. 280):

"Re-enacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested."

It seems to be tacitly conceded that if the courts had in the year 1842 interpreted Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), that the word "smuggle" therein contained would have been given the definition of Hawkins, Russell, Gabbet, Bacon, and Gilbert. If that were the proper interpretation of the word when Congress adopted it, efflux of time could not change its meaning as used in that act. *Bridge Proprietors vs. Hoboken Company* (1864), 1 Wallace 116, 148; Maxwell on Interpretation of Statutes (3d London Edition,) 83; our brief, pp. 8–9. The Judicary Act of September 24, 1789 (1 Stat., 76), was interpreted in 1796 in the *Cassius*, 2 Dallas, 365, and in 1800 in *Evans vs. Bollen*, 4 Dallas, 342. Part of this act, with others, was embodied in the revision of December 1, 1873, approved June 22, 1874, as Sec. 629. On March 3, 1875 (18 Stat., 470), Congress passed "an Act to determine the jurisdiction of the Circuit Courts of the United States," and used the same language as that used in Sec. 9 of the Act of September 24, 1789 (1 Stat., 76). In *United States vs. Mooney* (1885), 116 U. S., 104, it was contended that a different meaning should be attached to these words in the new Act, but *Mr. Justice Woods* said (p. 106):

"It is not to be supposed that Congress, in using in the Act of 1875 the same language, so far as the present question is concerned, as that employed in the Act of 1789, intended to give it a meaning different from that put upon it by this court."

As we have already shown, the words of a statute must be understood *in the sense which they bore when it was passed. Bridge Proprietors vs. Hoboken Company* (1864), 1 Wallace, 116, 148; *Bischoff vs. Wethered* (1869), 9 Wallace 812, 816; Maxwell on Interpretation of Statutes (3d London Edition, 1896), 83; (our brief, p. 9). In *Bridge Proprietors vs. Hoboken Company* this court in the year 1864 gave the word "bridge" in a New Jersey statute of 1790, its meaning in 1790, although there had been no judicial determination of its meaning, and resort was had elsewhere.

(*b.*) *Authorities defining smuggling.*

The learned counsel for the United States, defendant in error, say in their brief (p. 13), that:

"The Supreme Court in the case of *United States vs. Dunbar* (156 U. S., 185), clearly approves Bouvier's definition of smuggling."

Congress, August 30, 1842, defined a specific crime by name, and that name was "*smuggling*." *Mr. Justice Storey* said in *United States vs. Smith* (1820), 5 Wheaton, 153, 160, "the definitions are necessarily included *as much as if they stood in the text of the Act.*" In Mill's Logic (Ed. Harper & Bro., 1888), Chap. II, Sec. 1, p. 29, it is stated:

"Section 1. 'A name,' says Hobbes, 'is a word taken at pleasure to serve for a mark which may raise in our mind a thought like to some thought we had before, and which being pronounced to others, may be to them *a sign of what thought the speaker had before in his mind.*' This simple definition of a name, as a word (or set of words) serving the double purpose of a mark to recall to ourselves the likeness of a former thought, and *a sign to make it known to others*, appears unexceptionable."

In Lieber's Hermeneutics (3d Ed., 1880), 10, it is stated:

"Those signs by which man most frequently endeavors to convey his ideas to another, and by which in most cases he best succeeds in conveying them, are words."

And again, at page 11:

"Interpretation is the art of finding out the true sense of any form of words; that is, *the sense which their author intended to convey*, and of enabling others *to derive from them the same idea which the author intended to convey*."

Mr. Justice Lamar makes the same statement in *Lake County vs. Rollins* (1889), 130 U. S., 662, 671, as follows:

"Words are the common signs that mankind make use of to declare their intention to one another."

The learned counsel for the United States, defendant in error, as already quoted, say in their brief (p. 13), that:

"The Supreme Court, in the case of the *United States vs. Dunbar* (156 U. S., 185), clearly approve Bouvier's definition of smuggling."

Bouvier cites as his authority "Bacon, Abr. *Smuggling*." The Supreme Court, therefore, accept the definition of Bacon. Bacon defines smuggling as set out in our brief (p. 11), and the same definition is given by Hawkins, Russell, and Gabbet (our brief, pp. 9–12). Bacon's Abridgement is chiefly the work of *Lord Chief Baron Gilbert* (Watt's Bibliotheca Britanica, Edinburg, 1824, Vol. I, par. 60 t.; Bridg. Leg. Bibiblog., 10; 2 Blackstone, 325, *note y*), thus adding to the definition the authority of a great name. Sir Geoffroy, or Jeffrey Gilbert, who was born in 1674, entered the Inner Temple in 1692, was called to the bar in 1698, appointed Judge of the Irish King's Bench in 1714, Chief Baron of the Irish Exchequer in 1715, Baron of the English Exchequer in 1722, Second Commissioner of the Great Seal in 1725, and Chief Baron of the Exchequer in the same year. He was invested with the coif, knighted, and was connected with the

great case of *Annesley vs. Sherlock* (Vol. 15, State Trials, pp. 1301–1316), which settled the right of the English House of Lords to entertain an appeal from the Irish House of Lords. For carrying out the decree of the English House of Lords, he was committed by the Irish House of Lords. He died in 1726. None of his numerous works appeared in his lifetime, and after his death some were published over his own name, as Reports of Equity Cases (as to which he began to take notes in 1706), histories of the Courts of Exchequer, Common Pleas, and Chancery, Commentaries on Uses and Trusts, Tenures, Devices, Ejectments, Distresses, Execution, Rents, Remainders and Evidence, and others, over the names of his editors as the Abridgement of the Law. The "Abridgement of the Law" (which appears over the name of the editor, Matthew Bacon,) and his "Law of Evidence" have been the most enduring of his works.

While the high authority of Hawkins, Russell, and Bacon (our brief, pp. 9–11, 27) is not questioned, in the brief of the learned counsel for the United States, defendant in error, "Gabbet's Criminal Law" is assailed (their brief, p. 10) as "obscure and without great weight." Without having time to examine every criminal case decided by this court for citations of Gabbet, we notice that in the year 1878, in one of the cases heretofore cited by us in our brief on this third oral argument (p. 81), to wit, *Reynolds vs. United States* (1878), 98 U. S. 145, that this work is quoted (at p. 155) by *Mr. Chief Justice Waite*. Their criticism of Gabbet (their brief, p. 10), is, that he uses the word clandestine before the word "bringing." This critcism does not in any way affect the question, because for the purpose of the argument it is unimportant whether smuggling means *clandestinely* bringing on shore or *openly* bringing on shore.

Anderson's Law Dicticnary is also cited (their brief, p. 13). William C. Anderson gave his law dictionary to the world in the year 1889. Under the title "Smuggling" he gives the

definition contained in the interpreting clause in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186; 1 Sup. Rev. Stat., 77). To cite Anderson is begging the question, because he cites and quotes the Anti-moiety Act, which gives a definition of smuggling "*for the purposes of this act.*" (Our brief, pp. 28–37.) Anderson also states that smuggling implies something illegal and is inconsistent with an innocent intent, and conveys the idea of a secret introduction of goods with intent to avoid payment of the duty, and cites in support thereof "*United States vs. Claflin* (13 Blatch., 184, 175, *Benedict, J.; Stockwell vs. United States*, 13 Wall., 546 (1871)." The sum and substance is, that Anderson merely referred to the Anti-moiety Act, and gives the definition for the purpose of that act. This merely supports our contention, that the same word in different acts of Congress may have a different meaning in each act. (Our brief, pp. 28–31.)

Abbott's Law Dictionary is also referred to. Benjamin Vaughan Abbott first gave his work to the world in 1879. His definitions are practically based on the Anti-moiety Act of June 22, 1874 (18 Stat., 186), and *United States vs. Claflin* (13 Blatch., 178), and the same comment is applicable to this as was made on Anderson.

In another case cited, it appears that one Gates was indicted for a violation of Section 19, of the Act of August 30, 1842 (5 Stat., 548, 565), pleaded guilty thereto and suffered fine and imprisonment. A suit was then filed by the United States against him in *United States vs. Gates* (1845), 2 N. Y., Leg. Obs. 8; 8 Law Rep., 465; 25 Federal Cases No. 15, 191, p. 1263, for a penalty under Section 50 of the Act of March 2, 1799 (1 Stat., 627, 665). *Mr. District Judge Betts* necessarily implies that bringing on shore is a part of the crime of smuggling when he says that the—

"Question raised by the demurrer in this case is substantially whether a person convicted and punished by fine and imprisonment for *smuggling goods on shore* in this port (*thus*

landing them without a permit) is liable also to an action for $400 penalty for such landing."

Another authority referred to is Jacob's Law Dictionary. An examination of that compilation fails to disclose the word "smuggle" or the word "smuggling." In Vol. 2, Jacob's Law Dictionary (Ed. by E. T. Tomlins, London, 1797), title "Smugglers," we find the following, to wit:

"*Smugglers.*" Those persons who conceal prohibited goods and defraud the King of his customs on the sea coast by importing goods without paying the duties imposed by the laws of customs and excise. See these titles, particularly the first."

An examination of the titles referred to throw no light on the question, and do not define the words "smuggle" or "smuggling." Jacob cites no authority, and is not a commentary or treatise upon the law, and his book is purely a dictionary. Even the title "Smugglers" is not strictly a definition. Mill's Logic (Ed. Harper & Bro., 1888), Chapter 8. Jacob's definition of a smuggler is not, properly speaking, a legal definition of even the word smuggler, because it no more describes a smuggler than other well-known violators of the revenue laws who are not in a legal sense smugglers.

Jacob does not say where the goods are concealed unless when he says "on the sea coast." If they be concealed on the sea coast the word would seem to imply that they were brought on shore. If Jacob means anything else than what he says, it is inconsistent with the law writings and commentaries of his contemporaries and those who went before and after him. He seems to use the word, not in the legal technical sense to define the crime of smuggling. It is a very common thing for a law-writer to use a word as conveniently covering the whole subject, and thereafter in his treatise to apply that word accurately to a part of the subject embraced under the general title. The title in Bacon's Abridgement is "Smuggling." Under that title he divides up his subject and defines

the crime of smuggling, and then defines a great number of other crimes which are not smuggling, but are other offenses against the revenue. This is very clear from a quotation we have already made (our brief, p. 27) from 6 Bacon's Abridgement (5th Ed.) 286; 7 Bacon's Abridgement (7th Ed.) 354; 9 Bacon's Abridgement (Amer. Ed., 1876, by Bouvier) 140, to wit:

"As the offense of smuggling is not complete unless some goods, wares or merchandise are actually brought on shore, or carried from shore contrary to law, *a person may be guilty of divers practices which have a direct tendency thereto, without being guilty of the offense.*"

And this is seen in works on various branches of the law. A work entitled "Law of Trade-marks" treats of trade-marks and unfair competition. Such a work defines a trade-mark and gives examples of trade-marks, and then devotes the major portion of the work to cases on unfair competition in business, and is careful to state that they are not trade-mark cases. There is no doubt but that Giles Jacob was a prodigious and diligent compiler, but he does not rank as a commentator with Gilbert, Bacon, Hawkins, and Russell, or even Gabbot. Giles Jacob was noted as having written "Poetical Register, or Lives and Characters of the English Dramatic Poets," "Love in the Wood," "Soldier's Last Stake," "Human Happiness," "Journey to Bath and Bristol," "Essay on Life," "Essay on Criticism," and others—prose, poetry, and playwrights.

The learned counsel for the United States, defendant in error, cite (their brief, p. 14) H. J. Stephen's Summary of the Criminal Law, 89. This is inaccessible to us, but as stated in their brief (p. 14), Stephen relied, for his authority, upon Russell. Russell defines smuggling as already given (our brief, p. 10). Warren's Law Studies (2d. Ed., 1845) 620, says that Russell is "the best general treatise on criminal law." The same writer, in speaking of other authorities states that

Mr. Sergeant Hawkins' Pleas of the Crown is "of great authority with the courts." Not having Stephen's Summary of the Criminal Law before us neither can we determine in what sense he uses the words "import" or "export."

Bell's Dictionary of the Law of Scotland, and Hume's Commentaries on the Law of Scotland are also cited (their brief, p. 14), and not being accessible we do not know what weight is to be given Scotch Dictionaries and Commentaries on Scotch Law, when the English law writers uniformly give a different definition of smuggling, nor do we know in what sense Bell or Hume use the words "import" or "export." It is now admitted by the learned counsel for the United States, defendant in error (their brief, p. 15), that "*no reference has been found in any of the Scotch or Irish Authorities [cited by them] to the common-law crime of smuggling.*"

The mere assertion on the part of the learned counsel for the United States, defendant in error, cannot sweep away or render obsolete Hawkins, Gilbert, Bacon, Russell, and Gabbet, which have appeared in numerous editions between the years 1716 and 1896, both inclusive (our brief, pp. 9–12), a period of over one hundred and eighty (180) years.

(*c.*) *The common law or legal meaning of the word applies.*

It is now for the first time contended (their brief, p. 13) that the word smuggle shall be given its mere etymological or popular meaning, and not its legal meaning. To do so would be to overrule all of the authorities (our brief, pp. 8–15), and *Dunbar vs. United States* (1895), 156 U. S., 185. In this case *Mr. Justice Brewer* turned to a law book to ascertain the meaning of the word smuggle, and that law book was Vol. 2, Bouvier's Law Dict., p. 528, which in turn cited another law book, to wit, Bacon's Abridgement, and one of the editions of same was under the editorship of the same Bouvier who defines smuggling as we have heretofore set out (our brief, p. 11). In the case of the *United States vs. Claflin* (1875), 13

Blatch, 178, mostly relied upon by the learned counsel for the United States, defendant in error, *Mr. District Judge Benedict*, said (at p. 184) that :

"The word 'smuggle' is a technical word having a known and accepted meaning."

In addition to the other authorities already referred to by us (our brief, pp. 13–15), we desire to add Bacon's Abridgement (5th Ed., 1798), 383, to wit:

"If a statute make use of a word, the meaning of which is well known at the common law, the word shall be understood *in the same sense it was understood at the common law.*"

To accept the suggestion of the learned counsel for the United States, defendant in error, would be to upset the uniform holdings of this court from 1818 to 1898, and overrule the cases of *United States vs. Palmer* (1818), 3 Wheaton, 610, 630, 636, 640; *United States vs. Smith* (1820), 5 Wheaton, 153, 159–160; *Swearinger vs. United States* (1896), 161 U. S., 446, 451; *Moore vs. United States* (1875), 91 U. S., 270, 274; *Smith vs. Alabama* (1887), 124 U. S., 465, 478–479; *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 653–654, 654, 655, 662, 679–680, 707 (our brief, pp. 12–15). *In Rice vs. Railroad Company* (1861), 1 Black, 358, *Mr. Justice Clifford* said (pp. 374–375), that:

"In the construction of the laws of Congress the rules of the common law furnish the true guide."

In *Miles vs. Williams* (1714), 1 Peere Williams, 219, *Lord Chief Justice Parker* said (p. 252) that:

"The best rule of construing acts of Parliament is by the *common law.*"

The learned counsel for the United States, defendant in error, are inconsistent, for in another part of their brief (p. 12) they use this language:

"The *ordinary legal meaning* of the verb 'to smuggle' should be accepted in defining what is meant by the crime."

The frequent enactment in England (their brief, pp. 20–22) of statutes making acts criminal other than the recognized common-law crime of smuggling, shows that the word smuggle had a well recognized legal meaning and covered a subject on which it was unnecessary to legislate, but that it did not cover numerous other acts preceding and following smuggling, and which it was desirable to make criminal. The same can be said of the American legislation (their brief, pp. 23–27). When Congress, on August 30, 1842 (5 Stat., 548, 565, Sec. 19), punished smuggling, it provided for a punishment of that which before was not punishable in America and which of itself as common law had no force, but became of force August 30, 1842, *because Congress made that common law a Federal Statute, and it derived its force and effect from the statute.*

Mr. Justice Storey said in *United States vs. Smith* (1820), 5 Wheaton, 153, 160:

"The crime is not less clearly ascertained than it would be by using the *definitions of these terms as they are found in our treatises of the common law.* In fact, by such a reference, the definitions are necessarily included, *as much as if they stood in the text of the Act.*"

(*e.*) *Non-legal definition of smuggling.*

The learned counsel for the United States, defendant in error, cite (their brief, pp. 10–12) Johnson, Webster, Encyclopædic Dictionary, Imperial Dictionary, Century Dictionary, Worcester, Encyclopædia Brittanica, McCullough's Commercial Dictionary, Standard Dictionary, Stormouth and Penny Enclyclopædia. These compilations do not sustain the position that in law the word smuggle means something different than that laid down by Hawkins, Russell, Galbot, Bacon, and Gilbert, but on the contrary, when carefully considered, sustain our position.

Webster, Worcester, Century, Standard, and Johnson in effect define "smuggling" as importing or exporting *prohibited* goods or *dutiable* goods without paying the duty. It is conceded by the learned counsel for the United States that this is an ordinary and popular definition of smuggling and not a legal definition. The words "import" and "export" are, therefore, used in an ordinary or popular, and not a legal sense. In a legal sense the word "import" means bringing into a port with intent to land (our brief, pp. 44–46). If Webster, Worcester, Century, Standard, and Johnson used the word "import" in a legal sense, then a different question might be presented. These dictionaries bear internal evidence that their compilers do not use the word "import" in a legal, but in an ordinary or popular sense. In Webster's Dictionary (1890) the following is found (p. 737), to wit:

"*Im-port'* (im-pōrt') v. t. [imp. p. p. Imported; p. pr. & ob. n. Importing] [L. *importare* to bring in, to occasion, to cause, pref im. in + *portare*, to bear. Sense 3 comes through F. *importer* from the Latin. See Post demeanor].

"1. To bring in from abroad, to introduce from without; especially, to bring (wares or merchandise) into a place or country from a foreign country, in the transactions of commerce;—opposed to *export*. We *import* teas from China, coffee from Brazil, etc.

"*Import* (im-port), n. 1. Merchandise imported brought into a country from without its boundaries—generally in the plural, opposed to *exports*.

"I take the *imports* from, and not the exports to, these conquests, as the measure of these advantages which we derived from them.—Burke."

In Webster's Dictionary (1890), the following is found (p. 529), to wit:

"*Export'* (ĕks-pōrt') v. t. [imp. and p. p. Exported; p. pr. and vb. n. Exporting]. [L. exportare, exportateau; ex, out, and portare, to carry; c. f. exporter. See Port demeaner].

"2. To carry or send abroad, or ou of a country, especially to foreign countries as merchandis r commodities in the way of commerce. The opposite nport; as to *export* grain, cotton, cattle, goods, etc.

"*Ex'pōrt* (ĕkspōrt), n. 1. The act of exporting, exportation; as, to prohibit the *export* of wheat or tobacco.

"2. That which is exported, a commodity conveyed from one country or state to another in the way of traffic;—used chiefly in the plural, exports.

"The ordinary exchange . . . between two places must likewise be an indication of the ordinay course of their *exports* and imports.—A. Smith."

In Worcester's Dictionary (1884), the following is found (p. 725), to wit:

"*Import* (114), v. a. [L. importo; *im* in, and porto, to bear; It. *importare*; Sp. importar, Fr. importer]. [i. imported, p. p. importing, imported].

1. To bring or carry into a country from abroad; opposed to export.

Import (114), [im'port—S. W. P. T. E. F. H. Sm. R. Wr. impōrt,' Ju], n.

3. "Anything brought from abroad or imported; merchandise imported; opposed to *export*. Our imports ought not exceed our exports.—Johnson. Syn. See signification."

In Worcester's Dictionary (1884) the following is found (p. 522), to wit:

"*Export*, v. a. [L. exporto, to carry from or away, ex from, and *porto*, to carry; It. esportare; Sp. exportur; Fr. exporter.] [i, exported; pp, exporting, exported]. To carry or send out of a country, as merchandise.— Addison.

"*Export*, n. A commodity carried to a foreign market; that which is exported. Schedules containing an account of the imports and exports.—Bp. Berkeley."

In the Century Dictionary (1889) the following is found (Vol. III, p. 3013), to wit:

"*Import* (im-pōrt') v. [OF, emporter, importer, carry, F. emporter, carry away, prevail, importer, import, matter, signify; also, more recently, in the lit. sense of the L. introduce, import;=Sp. Pg., importar;=It., importare, signify, express [L. importare, importare, bring in, introduce from abroad, bring about, occasion, cause] in, in × portare, carry; see part 3, Cf., export, etc.] I. trans. 1. To bring from without; introduce from abroad; especially to bring from a foreign country, or from another State, into one's own country or State opposed to export; as to import wares and merchandise.

"Others *import* yet nobler arts from France,
Teach kings to fiddle, and make senates dance.
—Pope, Dumiad, IV, 596.

"From Greece they [the Latins] derived the measures of their poetry, and, indeed, all of poetry that can be *imported.*
—Macaulay History.

"Wheat and corn are extensively *imported* into Cork.
—Encyc. Brit., VI, 406.

"*Import* (im′pōrt), n. [OF, emport, a carrying away, influence, favor, importance; from the verb; see import, v.]

"1. That which is imported or brought from without or from abroad; especially merchandise brought into one country from another; usually in the plural; opposed to export.

"I take the imports from, and not the exports to, these conquests, as the measure of these advantages which we derived from them.—Burke, Late State of the Nation."

In the Century Dictionary (1889), the following is found (Vol. II, p. 2084), to wit:

"*Export* (eks-pōrt′), v. t. [=F. exporter=Sp. exportar=D. exporteren=G. exportiren=Dan. exportere=Sw. exportera [L. exportare, carry out, carry away [ex, out, + partare, carry, bear, see port.]

"Specifically—2. To send to a distant point, as commodities, send for sale or exchange to other countries or places.

The liberty of exporting wool had . . . been cut down before the English manufacturers were able to take up the home supply.—Ency. Brit., VI, 410.

"*Export* (ĕks-port), n. [=D. Dan. Sw. export; from the verb] 1. The act of exporting; exportation: as, to prohibit the *export* of grain.

"An efficient patrol of the sea by armed cruisers would stop the importation of food and the export of commodities in a week.—The Engineer, L. XV, 407.

"2. That which is exported; a commodity carried from one place or country to another for sale; generally in the plural.

The ordinary course of exchange between two places must likewise be an indication of the course of their exports and imports.—Adam Smith, Wealth of Nations, IV, 3.

"The amount of *exports* for 1883 being, according to the treasury estimate, no less than ninety millions of dollars.
—D. Webster, Senate, March 18, 1834."

In the Standard Dictionary (1874), the following is found (Vol 1, p. 902), to wit :

"*Import*, im-pōrt, v. 1. To bring from a foreign country or state into one's own country or state ; introduce from abroad, especially commercially ; opposed to export ; as, to *import* woolen goods ; to *import* labor.

"*Import*, im'port, n. 2. That which is imported from one country into another ; mostly in the plural ; as, our *imports* fall short of our exports."

In Johnson's Dictionary (1818), the following is found (Vol. 3), to wit :

"*To Import*, v. a. [Importo, Lat].

1. To carry into any country from abroad ; opposed to export.

" For Ellis I would sail with intenst speed,
To *import* twelve mares, which there luxurious feed."
Pope.

"*Import*, n. s. [from the verb. Formerly the accent was constant on the last syllable of this word ; in modern times, frequently on the first syllable, and certainly always so in the third meaning.]"

In Johnson's Dictionary (1818), the following is found (Vol. 2), to wit :

"*To Export*, v. a. [*exporto*, Latin]. To carry out of a country, generally in the way of traffick.

"Edward III, by his encouragement of trade, turned the scale so much in favor of English merchandise that, by a balance of trade taken in his time, the *exported* commodities amounted to two hundred and ninety-four thousand pounds, and the imported but to thirty-eight thousand.—*Addison, Freeholder.*

"Great ships brought from India precious wood and *exported* pearls and robes.—*Abuthnot on Coins.*"

"*Export n. s.* [from the verb]. Commodity carried out in traffic.

"Whether there should not be published, yearly, schedules of our trade, containing an occount of the imports and *exports* of the year ?—*Bp. Berkeley, Querist*, 179."

Giving the word "import," in the definition of smuggling, its ordinary and popular meaning, the argument of the

learned counsel for the United States, defendant in error, fails.

McCullough's Dictionary, Stormouth, and the Penny Cyclopedia do not bear out the contentions of the learned counsel for the United States, defendant in error.

In McCullough's Dictionary of Commerce and Commercial Navigation (1875), the following is found:

"*Smuggling*. The offense of importing *prohibited* articles, or of defrauding the revenue by the *introduction* of articles into consumption, without paying the duties chargeable upon them. It may be committed indifferently either upon the excise or customs revenue."

In the Dictionary of the English Language (1885), by the Rev. James Stormouth, revised by the Rev. P. N. Phelp, the following is found:

"*Smuggle*, v. smug'gl. [Dan., smugle; Ger., schmuggeln; Dut., smokkelen, to smuggle; O S., smugan, to creep; Icel, smuygja, to slip into], to bring goods into or carry goods out of a country secretly in order to escape payment of the legal duties; to convey clandestinely; smuggling, inp-gling; n., the offense of passing goods into or out of a country without paying the legal duties; the act or practice of; smuggled, pp. and a-gld; smuggler, u, gler, one who smuggles; a ship employed in smuggling."

In the Penny Cyclopedia of the Society for the Diffusion of Useful Knowledge (1841), the following is found (Vol. 22), to wit:

"Smuggling is the clandestine introduction of prohibited goods; or the illicit introduction of goods by the evasion of the legal duties."

There are many other lexicographers who give the definition contained in the legal authorities already quoted (our brief, pp. 9–12).

In Bailey's Etymological English Dictionary (1747), the following is found, to wit:

"*To smuggle* [smuckelen, Du.; schmuckelen, Teut.; smaggertz, Dan.] to *run goods ashore, or bring them in by stealth.*"

In Bailly's Dictionarium Brittannicum (1780), the following is found:

"*To smuggle* (smukelen, Du.). *To run goods ashore, or bring them on shore by stealth without paying the customs.*"

In Bailey's English Dictionary (London, 25th Edition, 1783) the following is found:

"*To smuggle* [smeeckele, Belg.; schmeichelen, to fawn and flatter, Teut.; smaggerer, Dan.], *to run goods ashore or bring them in by stealth.*"

In Bailey's English Dictionary (25th Edition, enlarged and carefully corrected by Edward Hardwood, D. D., 1790), the following is found:

"*To smu'ggle* [smeeckle, Belg.; schmeichelen, to fawn and flatter, Teut.; smaggerer, Dan.], *to run goods ashore or bring them in by stealth.*"

In a New General English Dictionary by Rev. Mr. Thomas Dyche and finished by William Pardon Gent (1787) the following is found:

"*Smu'ggle* (v.), to run goods out of a ship clandestinely, without paying the duty the government has appointed.
"*Smu'ggler* (s.), one who makes a trade of carrying or exporting *prohibited* goods out of, and bringing such into, a nation; and also *that brings goods ashore and from aboard a ship, that are* ALLOWED, *without paying the duties or customs appointed.*"

In the New World of Words or Universal English Dictionary, by Edward Phillips, revised by J. N. Philobibl (1770), the following is found:

"To smuggle goods, *to run them ashore, or bring them in by stealth without paying the custom.*"

The Encyclopædia Britannica uses the word as a general one to denote all kinds of crimes against the revenue, and

deals exclusively with statutory crimes. This is apparent (9th Ed., 1887, Vol. 22, p. 185) where the writer of the article says that:

"The penalty for smuggling in the United States will be found mainly in title XXXIV, Ch. 10, of the Revised Statutes."

We have already had occasion to comment on this (*ante*, pp. 9–10).

The Encyclopædic Dictionary and the Imperial Dictionary, cited by the learned counsel for the United States, defendant in error, are not accessible to the writers of this brief, and, therefore, cannot be commented on.

II.

The Definition in the Anti-Moiety Act Does Not Apply.

(1.) The construction of a Federal Statute cannot be regarded as settled until adjudicated by the Supreme Court of the United States.—*Post p. 21.*

(2.) Courts are not at liberty in construing an act of Congress to recur to the views of individual members in debate, nor to consider the motives which influence them to vote for or against its passage. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might have differed from each other. A law, as it is passed, is the will of the majority of both houses, and the proper way to interpret or construe a legislative act is from the language used in the act.—*Post pp. 21-26.*

(3.) The words "for the purposes of this act," in Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), are plain and unambiguous, and cannot be stricken out by resorting to the individual opinions of members of Congress. And even if such resort be had, nothing was said by them which will justify the Court in striking them out.—*Post pp. 26-27.*

(4.) Courts may, when an ambiguity exists in a statute, look to the public history of the times in which it is passed to solve the ambiguity. If a case be not within the language of a criminal statute, it cannot be held to be within the statute, although a resort to the debates in Congress or the history of the times may show that it was the intention of Congress to include it within the statute. There are no constructive crimes.—*Post pp. 24-26.*

(5.) The same rules as set forth in the above four paragraphs apply to administrative practice. The administrative practice under this act throws no light on the question.—*Post p. 27.*

(*a.*) *Dictum in the Claflin Case.*

What was said by *Mr. District Judge Benedict* in the *Claflin Case* was *obiter dictum.* (Our brief, pp. 34–37.) Even if it had been a decision on a question properly before the Court, it would not be binding. *Mr. Justice Blatchford* said (in reference to a decision by a *nisi prius* court in a patent case) in *Andrews vs. Hovey* (1888), 124 U. S., 694, 716, that —

"A question arising in regard to the *construction of a statute of the United States* concerning patents for inventions *can not be regarded as judicially settled when it has not been so settled by the highest judicial authority* which can pass upon the question."

(*b.*) *Debates in Congress.*

It is now contended by the learned counsel for the United States, defendant in error, that the words "for the purposes

of this act" may be struck out because of the debate on the Anti-Moiety Act. From the parts of the debate quoted (their brief, pp. 44–47), no reference is made to Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., and even if there had been the words "for the purposes of this act," can not be eliminated even though individual members of Congress had stated to the contrary. The words "for the purposes of this act" are plain, unambiguous words, were inserted in the statute, and can not be denied their full meaning. This court has repeatedly laid down the rule that it is unsafe to resort to the debates in Congress to raise a doubt as to the meaning of words, and resolve that doubt by substituting the language of senators and representatives used in debate for the language used in the Congressional enactment. *Aldridge vs. Williams* (1845), 3 Howard, 9, 24; *United States vs. Missouri Pacific R. R. Co.* (1875), 91 U. S., 72, 79; *United States vs. Freight Association* (1897), 166 U. S., 290, 318.

In *Aldridge vs. Williams* (1845), 3 Howard, 9, *Mr. Chief Justice Taney*, said (p. 24), that:

"In expounding this law, the judgment of the court can not, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the Act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *United States vs. Union Pacific R. R. Co.* (1875), 91 U. S., 72, *Mr. Justice Davis* said (p. 79), that:

"In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influence them to vote for or against its passage. The Act itself speaks the will of

Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

In *United States vs Freight Association* (1897), 166 U. S., 290, *Mr. Justice Peckham* said (p. 318):

"The reason is that it is impossible to determine with certainty what construction was put upon an Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and upon occasion, by a resort to the history of the times when it was passed. (Cases cited *supra*.)"

The proviso to Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), was passed in the same form in which it appeared in the bill. The words "for the purposes of this act" are plain and unambiguous, and the cases of *Elk vs. Wilkins* (1884), 112 U. S., 49, 112–114, and *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 682, 697, cited by the learned counsel for the United States, defendant in error, in no way conflict with the cases already cited by us (*supra*, pp. 22–23).

In *Elk vs. Wilkins* (1884), 112 U. S., 94, Elk, an Indian, sued Wilkins, a registrar of elections, for refusing to register Elk as an elector. The question was, whether Elk was a citizen of the United States. The opinion of the Court was delivered by *Mr. Justice Gray*, and the page references in the brief of the learned counsel for United States, defendant in error, are to the dissenting opinion of *Mr. Justice Harlan*. The dissenting opinion does not sustain the position for which it is quoted, because the learned Justice makes the references for the purpose of showing the legislative amendments in the bill which became the Act of April 9, 1856 (14 Stat., 27), which preceded the adoption of the Fourteenth Amendment.

In *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, *Mr. Justice Gray* refers (pp. 681-682) to *Elk vs. Wilkins*, and instead of sustaining the position of the learned counsel for the United States distinctly states (at p. 699) that:

"Doubtless *the intention* of the Congress which framed and of the States which adopted this amendment of the Constitution *must be sought in the words of the amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words.* But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves; and are at the least interesting as showing that the application of the amendment to the Chinese race was considered and not overlooked."

In the case at bar no such legislative history appears, and the debates in Congress when examined destroy rather than sustain the position of the learned counsel for the United States, defendant in error.

We will now take up the other authorities cited by the learned counsel for the United States, defendant in error (their brief, p. 45).

In *Spencer vs. State* (1854), 5 Ind., 41, 49, *Mr. Justice Perkins*, after stating the ancient custom of judges going to the legislature and asking its members what they meant, states the modern practice (p. 49) as follows, to wit:

"But the practice has not been revived and we now go not to the legislature, but to the language of the statutes they enact for the public and governed by certain established and binding rules of construction, we, from that, declare the legislative intention. * * * * There is no necessity, therefore, for us to inquire whether the legislature, or the members of it, really personally did mean that a later statute, totally repugnant to a former, should repeal such former statute or not * * * * That body is estopped by its language."

In *American Net and Twine Co. vs. Worthington* (1891), 141 U. S., 468, *Mr. Justice Brown* (p. 474), resolved a doubt in a tariff law in favor of an importer. He stated (pp. 473-474) that:

"While *the statements made and the opinions advanced by the promotors of the act in the legislative body are inadmissible as bearing upon its construction*, yet reference to the proceedings of such body may properly be made to inform the Court of the exigencies of the fishing interest and the reasons for fixing the duty at this amount."

Tariff laws, like criminal statutes, are to be strictly construed, and in the case cited this Court did not impose a duty not within the language of the Tariff Act by resorting to debates in Congress, but relieved the importer from a duty by considering the exigencies of the fishing interests and the reasons for fixing a specific duty on a specific article.

In *Holy Trinity Church vs. United States* (1892), 143 U. S., 457, *Mr. Justice Brewer*, in construing the contract labor law, a criminal statute, exempted a case in favor of the accused, although within the language of the statute, but did not include a case not within the language of a statute by a reference even to the history of the time or the history of the bill in the legislative body.

In *Texas and Pacific Ry. Co. vs. Interstate Commerce Commission* (1895), 162 U. S., 197, 218, merely held that the law creating the Interstate Commission was experimental, and that the court could look at the history of the legislation. This resulted in a decision in favor of the Railway Company.

United States vs. Laws (1896), 163 U. S., 258, 262, also construed the contract labor laws. *Mr. Justice Peckham* merely stated that the courts might resort to a history of the times to exclude a case which was within the language of a statute, but it did not hold that a criminal statute could be extended by construction to a case not within the language of a statute, because of the history of the times.

None of the authorities cited have any bearing upon the Anti-moiety Act, and especially no bearing upon the interpreting clause, as contained in section 4 of that statute.

There is nothing shown in "the history of the times" which would cause this court to strike out the words "for the

purposes of this act." And even if we consult the debate, there is nothing to bear out the contentions of the learned counsel for United States, defendant in error. The Anti-moiety Bill, H. R. No. 3171, contained the same interpretating clause as finally passed and was reported May 19, 1874, by Mr. Ellis H. Roberts, M. P., from the Committee on Ways and Means (Congressional Record, 43d Congress, 1st Session, Vol. 2, Part v, page 4026). The debates may be found recorded between pages 4026–4052; 4718–4732; 4801–4829. These were not debates on the Act of August 30, 1842, but debates on the Bill which became the Act of June 22, 1874 (18 Stat., 186). Even if it were proper to resort to the debates, no light is thrown upon the question. We take the following from the debate (p. 4026), to wit:

"MR. CONKLING.—* * * * I pass on to the eighth line. *Provided*—Now comes a definition of smuggling, as the Senator from Ohio nearest me explained, to take the place of all the present definitions of smuggling.

"MR. SHERMAN.—*No. I beg pardon.*

"MR. CONKLING.—Well, of the *two* definitions. Are there more than two?

"MR. SHERMAN—I said expressly on the contrary, that this did not affect in the slightest degree the action against smuggling, but it says expressly, '*Provided*, That for the purposes of this act.' That is, for the purposes of obtaining compensation for this service.

"MR. CONKLING.—If my honorable friend will bear with me for a moment he will see that he is only anticipating me. *Of course, it is 'for the purposes of this act.'* . . I am coming to that. But first, did he not tell us that for the purposes of this act this definition of smuggling was intended to take the place of the now prevailing definition? Certainly he did, and he will not have told us that, because we all know that that will be the effect of it.

"MR. SHERMAN.—Does the Senator now think that this act, or any word in it, repeals the laws against smuggling?

"MR. CONKLING.—If my friend will pardon me for a moment he will find out what I think. Had the Senator said 'that for the purposes of this section' that should be the law, there would be a place for his argument to rest upon at least as large as the sole of a dove's foot; but as it is now, there is nothing, absolutely nothing, for the argument to rest on, as I think I can show. Let me see.

"*Provided*, That for the purposes of this act—
"That means every part of *this act*, does it not? *My friend nods assent to that.*"

(*d.*) *Administrative practice.*

The restrictive words "*for the purposes of this act*" are plain and umambiguous. If it be argued that resort may be had to administrative practice to strike them out the answer is, that similar contentions have been uniformly overruled by this Court. *Edwards vs. Darby* (1827), 12 Wheaton, 206–210; *United States vs. Temple* (1881), 105 U. S., 97, 99; *Swift vs. United States* (1881), 105 U. S., 691, 694–695; *United States vs. Graham* (1884), 110 U. S., 219, 221; *United States vs. Trainer* (1893), 147 U. S., 661, 663; *United States vs. Alger* (1894), 152 U. S., 384, 397. And even if it were proper to resort to claimed administrative practice as written in the opinion of *Mr. Acting Attorney-General Phillips* in the year 1884 contained in 18 Opinions of the Attorney General, 60, and communications of Feb. 26, March 19, and April 14, 1896, of *Mr. Comptroller of the Treasury Bowler* in 2 Decisions Comptroller of the Currency, 420, 458, and 491, we find nothing therein throwing light on this question.

III.

Clandestinely Introduce.

(1.) **The words "clandestinely introduce" contained in Section 19 of the Act of Aug. 30, 1842 (5 Stat., 548, 365), now Sec. 2865, Rev. Stat., do not create a distinct offense. Said Section 19 created but two crimes, the first "smuggling," and the second, passing goods through the custom-house by means of false, forged, or fraudulent invoices. *United States vs. Sixty-seven Packages of Dry Goods* (1854), 17 Howard, 85, 93.—*Post pp. 28-29.***

(2.) If the words "clandestinely introduce" constitute a distinct offense, the crime is not properly charged.—*Post p. 29.*

(3.) If the words "clandestinely introduce" constitute a distinct offense, the facts do not make out an offense.—*Post p. 29.*

(4.) If the words "clandestinely introduce" constitute a distinct offense, it was error for the court to charge the jury, that if they found the defendant guilty of "smuggling," to find him guilty generally.—*Post p. 30.*

In the brief of the learned counsel for the United States, defendant in error (p. 39 and p. 65), the assertion is made, without arguing it, that the words "clandestinely introduce" contained in Section 19, Act of Aug. 30, 1842 (5 Stat., 548, 565), now Sec. 2865 Rev. Stat., created a distinct offense.

(*a.*) *These words do not create a distinct offense.*

We have given a history of this section in our brief (pp. 6–8), and have in this brief given some additional authorities bearing thereon (*ante* pp. 2–4). This assertion is disposed of by *Mr. Justice Nelson* in *United States vs. Sixty-seven Packages of Dry-goods* (1854), 17 Howard, 85, wherein he stated that this section created *two* crimes and *not* three crimes, as follows (p. 93), to wit:

"*It first makes the smuggling of dutiable goods into the country a misdemeanor;* and, secondly, the passing or attempting to pass them through the custom-house, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices; the latter is an attempt which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs."

It therefore follows that the second count of the indictment covers only the crime of smuggling, and not a distinct offense of clandestinely introducing.

A somewhat similar matter was presented in *Swearingen vs. United States* (1896), 161 U. S., 446. In this case defendant was indicted for a violation of the Rev. Stat., Section 3893, which enacts that "that every obscene, lewd *or* lascivious book . . . are hereby declared to be non-mailable matter," etc. The indictment alleged that the newspaper article in question "was obscene, lewd, *and* lascivious." It was urged that the indictment was bad for duplicity, but *Mr. Justice Shiras* said (at p. 450):

"If each adjective in the statute described a distinct offense, then these counts would be bad for duplicity, and the defendant's motion in arrest of judgment for that reason ought to have been sustained. We, however, prefer to regard the words, "obscene, lewd, or lascivious," used in the statute as describing one and the same offense. That was evidently the view of the pleader and of the court below, and we think this is an admissible construction."

Mr. Justice Shiras and the concurring justices sustained the indictment, but reversed the judgment upon other grounds. Therefore, the learned justices who dissented from the reversal concurred in that part of the opinion quoted.

(*b.*) *If the words "clandestinely introduce" constitute a distinct offense the crime is not properly charged.*

We have already discussed this question in the Revised Brief, pp. 51–56, and the argument will not be repeated.

(*c.*) *If the words "clandestinely introduce" constitute a distinct offense, the facts do not make out an offense.*

We have already discussed this question in the Revised Brief, pages 72 to 75, and the argument will not be repeated. The argument made in our brief as to the crime of smuggling is also applicable (our brief, pp. 25–28).

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(*d.*) *If the words "clandestinely introduce" constitute a distinct offense, it was error for the Court to charge the jury, that if they found the defendant guilty of smuggling, to find him guilty generally.*

We have already discussed this question in the Revised Brief, page 75, and the argument will not be repeated.

IV.

First Count of Indictment.

(1.) The first count of the indictment was fatally defective and a demurrer thereto ought to have been sustained. —*Post pp. 30-31.*

(2.) Importing contrary to law covers only prohibited goods.—*Post p. 31.*

(3.) The facts do not make out a case of importing contrary to law.—*Post p. 32.*

(4.) Full force and effect must be given all sections of the Statutes of the United States.—*Post p. 32.*

(5.) Plaintiff in error, Mr. Herman Keck, was found not guilty of the charge of importing contrary to law.— *Post pp. 32-34.*

(*a.*) *The first count of the indictment was fatally defective, and a demurrer thereto ought to have been sustained.*

This count was conceded to be defective by *Mr. Assistant Attorney-General Whitney* in his brief, filed October term, 1896, and this count was abandoned by him on the oral argument of this case during the same term. While *Mr. Assistant Attorney-General Hoyt* and *Mr. District Attorney Beck* brought out an elaborate brief, October term, 1897, in support of the first count, we understood the learned *Assistant Attorney-General* to abandon the first count on the oral argument that term.

We refer the Court to our *Reply Brief*, pages 1 to 12, dated January 19, 1898, submitted October term, 1897, and will not repeat the argument there made.

(*b.*) *Importing contrary to law covers only prohibited goods.*

In *United States vs. Thomas* (1870), 4 Benedict, 370, it was held that the expression "imported contrary to law" comprehended the importation of prohibited goods and the importation of goods in particular forms or conditions, and did not cover the case of irregularities to evade the payment of duties.

In *United States vs. Ninety-Five Boxes* (1874), 19 Int. Rev. Rec., 101; 27 Federal Cases, 171, it was held that this statute applied only to the importation of prohibited goods and importation of goods in particular forms or conditions.

In *United States vs. Nine Trunks* (1887), 22 Int. Rev. Rec., 317; 27 Federal Cases, 161, the trial judge came to the same conclusion. And as stated by the learned counsel for the United States, defendant in error, *United States vs. Claflin*, 13 Blatch., 178, supports the same view (their brief, p. 8).

The decisions of the District Courts in the cases of *United States vs. Thomas*, *United States vs. Ninety-Five Boxes*, *United States vs. Claflin*, and *United States vs. Nine Trunks* were but the application of the rule that criminal statute must be strictly construed, and cannot be extended by implication to cases not falling within their terms (our brief, pp. 21–25). The last case cited (a forfeiture case) went on error to the Circuit Court. *Mr. Circuit Justice Strong* held that this statute should be liberally construed, and could be extended to cases not falling within its terms. Witht his premiss the conclusion he reached is sound, *but he seems to have forgotten*, and failed to apply, the opinion delivered by him in *Stockwell vs. United States* (1871), 13 Wall, 531, 551–552, where he says that:

"*The act of 1866 is strictly penal, not at all remedial.*"

(*c.*) *Facts do not make out a case of importing contrary to law.*

If Sec. 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat., covers only the importation of prohibited goods it is clear that no crime was committed, because diamonds admissible were either as dutiable goods or on the free list (revised brief, pp. 29–31).

(*d.*) *Full force and effect must be given all sections of the statutes.*

The brief of the learned counsel for United States, defendant in error (their brief, pp. 65–68), seems to concede this, and it is no answer to use the epithets "chameleon-like," (their brief, p. 66) and "refined subtlety" (their brief, p. 68).

(*e.*) *Plaintiff in Error, Mr. Herman Keck, was found not guilty of importing contrary to law.*

The third count of the indictment was as follows (record, p. 2), to wit :

"3. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present that afterwards, to wit: upon the day and year aforesaid, the *said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this Court, did knowingly, willfully, unlawfully, and fraudulently, and with intent to defraud the revenue of the United States did import and bring into the United States, to wit : into the port of Philadelphia, certain goods, wares, and merchandise, to wit : five hundred and sixty-three diamonds, of great value, to wit : of the value of ten thousand dollars, contrary to law* in that due entry was not made by the said Herman Keck of the said goods, wares, and merchandise, the said goods, wares, and merchandise being then and there clandestinely and with intent to defraud the revenue of the United States concealed by the said Herman Keck from the view and inspection of the officer of the United States duly appointed by law to examine the same, to wit: the custom house inspector, and by concealing the said goods, wares, and merchandise in a small box the said Herman Keck did not then and there particularize the contents of the said box, nor did the said

Herman Keck mention the aforesaid goods, wares, and merchandise to the said officer, which said goods, wares, and merchandise were then and there subject to duty by law and should have been then and there invoiced and entered, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Plaintiff in error, Mr. Herman Keck, moved to quash this count of the indictment (record, p. 4), which the Court overruled. He then demurred to this count of the indictment (record, pp. 5–6), which the court overruled (record, p. 6).

The learned counsel for the United States, defendant in error, are clearly in error when they state that the learned trial judge held this count invalid (their brief, p. 66).

After all the evidence had been introduced, he requested the Court, among other things, to give the following charge to the jury (record, p. 109 and p. 111), to wit:

"No. 7. The jury are instructed that as the third count in each bill of indictment states that defendant, Herman Keck, imported and brought into the United States, and assisted in so doing, contrary to law, as is forbidden in Section 3082 of the Revised Statutes of the United States, in this, that he violated Section 2802 of the Revised Statutes, which prohibits a person concealing an article subject to duty in the baggage of a person arriving within the United States, which article was not, at the time of making entry for such baggage, mentioned to the collector, and the evidence in this case wholly fails to show the concealment of any article of baggage, *your verdict must be not guilty as to the third count in both bills of indictment.*"

The Court responded (record, p. 111):

"*The Court affirms the seventh point.*"

This took the third count of the indictment out of this case, and barred the United States then and thereafter from pursuing Mr. Herman Keck, plaintiff in error, on the charge of "importing contrary to law," and he could not then or

thereafter be put in jeopardy on a charge of violating Sec. 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat. *In re Snow* (1887), 120 U. S., 274; *Ex parte Nielson* (1889), 131 U. S., 176; *Ball vs. United States* (1896), 163 U. S., 662.

V.

ATTEMPT.

(1.) There is no statute punishing an attempt to smuggle or making an attempt to smuggle a separate offense. Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, punished two crimes, one smuggling, and the other passing or attempting to pass through the custom-house any false, forged, or fraudulent invoice.—Post p. 34-37.

(2.) The latter half of said section comprehends (a) the offense of passing goods through the custom-house by means of false, forged, or fraudulent invoices; and (b) attempting to pass goods through the custom-house by means of false, forged, or fraudulent invoices. It did not make an attempt to smuggle an offense. —Post p. 34-37.

(3.) The word "separate," in the phrase "separate offense," found in Sec. 9 of the Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., means distinct, separate, different, and apart; and the phrase "separate offense" means an offense distinct, separate, and apart from other offenses.—Post p. 37.

(4.) The definition in the Anti-moiety Act does not apply.—Post p. 37-38.

(5.) The facts do not constitute an attempt.—Post p. 38-39.

(6.) The facts do not constitute an attempt to smuggle, according to the testimony of Captain Loesewitz.—Post p. 40.

(7.) Plaintiff in error, Mr. Herman Keck, cannot be charged in any higher degree or to any greater extent for the acts of Captain Loesewitz than if he had done them himself.—Post p. 40.

(a.) *There is no statute punishing an attempt to smuggle* or *making an attempt to smuggle a separate offense.*

Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865 Rev. Stat., provided as follows, to wit:

SEC. 19. *And be it further enacted,* That if any person shall knowingly, and wilfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or *attempt to pass through the custom-house any false, forged or fraudulent invoice,* every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the Court."

This section created two crimes. They are thus stated by *Mr. Justice Nelson in United States vs. Sixty-seven Packages of Dry Goods* (1854), 17 Howard, 85, 93, to wit:

"*It first makes the smuggling of dutiable goods into the country a misdemeanor;* and, *secondly,* the passing or *attempting to pass them through the custom-house, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices;* the latter is an attempt which, *in effect and result,* is very much *akin* to that of smuggling, except done under color of conformity to the law and regulations of the customs."

It is contended that this created a "separate offence" of attempting to smuggle (their brief, p. 53). A careful reading of the language of Sec. 19 and the language quoted from the opinion of *Mr. Justice Nelson* does not bear out the contention. This section *first* makes the *smuggling* of dutiable goods into the country a misdemeanor. It *secondly* makes the *passing or attempting to pass through the custom-house any false, forged or fraudulent invoices, a misdemeanor.* The latter comprehends (a.) the offence of *passing goods through the custom-house by means of false, forged or fraudulent invoices,*

and (*b.*) *attempting to pass goods through the custom-house by means of false, forged or fraudulent invoices.*

As further said by *Mr. Justice Nelson*, in *United States vs. Sixty-seven Packages of Dry Goods* (1854), 17 Howard, 85, 92:

"The 19th Section of the Act of 1842 subjects the party to a misdemeanor and punishable as such, concerned in making an entry, who, with intent to defraud the revenue, 'shall make out, or pass, or attempt to pass, through the custom-house, any false, forged, or fraudulent invoice.'"

The passing or attempting to pass by means of the false, forged, or fraudulent invoices is not denominated or defined as smuggling or an attempt to smuggle, but is a distinct offense other than smuggling. *Mr. Justice Nelson* speaks of the offense of passing or attempting to pass goods through the custom-house, with intent to defraud the revenue by means of false, forged, or fraudulent invoices, "as an attempt which, *in effect and result*, is very much *akin* to that of smuggling." This is a distinct assertion that it is *not* smuggling, *nor* an attempt to smuggle. *Mr. Justice Nelson* simply stated an attribute common to all offenses against the revenue which, while *akin* to each other, are yet distinct offenses. This is no authority for the assertion (their brief, p. 53) that thereby a separate offense of an attempt to smuggle was created. Section 19 created an offense of *passing through the custom-house any false, forged, or counterfeit invoice*, and of *attempting to pass through the custom-house any false, forged, or fraudulent invoice.*

The dissenting opinion of *Mr. Justice Campbell*, in *United States vs. Sixty-seven Packages of Dry Goods* (1854), 17 Howard, 85, 96, quoted by the learned counsel for the United States, defendant in error (their brief, p. 53), in no way conflicts with the opinion of *Mr. Justice Nelson* on this point, but, on the contrary, supports our contention when the isolated lines (at p. 96) are read with the context preceding and following. He speaks of the revenue being *defrauded* by passing a false, forged, or fraudulent invoice as the consummated offense,

and adds that "the attempt to defraud is punished as well as the consummate effort." After discussing the matter of an invoice and the consummate crime of passing the invoice, and attempting to pass the invoice, he further adds (at p. 96):

"*There are, besides, provisions directed against smuggling.*"

He does *not* say that there are provisions directed against an attempt to smuggle.

If, in the case at bar, a count of the *indictment* had charged Herman Keck, plaintiff in error, with having "*passed* through the custom-house a false, forged, and fraudulent invoice," and the *evidence* showed that he had *attempted* to pass through the custom-house a false, forged, or fraudulent invoice, the argument would be unanswerable that under Sec. 9 of the Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., Mr. Herman Keck, plaintiff in error, could be convicted of the offense of *attempting to pass through the custom-house* any false, forged, or fraudulent invoice, although the count of the indictment charged him with having *passed through the custom-house* a false, forged, or fraudulent invoice.

It is urged by the learned counsel for the United States, defendant in error (their brief, p. 52) that there is some peculiarity to be attached to the words "separate offense" found in Sec. 9, of the Act of June 1, 1872 (17 Stat., 169, 198), now Sec. 1035, Rev. Stat. There is no difficulty in these words, and in the Revised Brief and Our Brief on this, the third, oral argument and this Reply Brief, we have understood these words and used them in sense in which they are defined by lexicographers, as meaning distinct, disjoined, unconnected, disconnected, separated, disunited, not united, parted, apart from others, divided from other. Its synonym is "different."

(*b.*) *The definition in the Anti-Moiety Act does not apply.*

We have already discussed this in our brief (pp. 28–37)

and this brief (ante pp. 20–27), and the arguments will not be repeated.

(c.) *The facts do not constitute an attempt.*

We have already discussed this (our brief, pp. 54–62), and the arguments will not be repeated.

What Captain Loesewitz offered to do is but *partly* stated by the learned counsel for the United States, defendant in error (their brief, p. 68). The *full* statement has been set out by us (our brief, pp. 54–62). The epithet "dialectics" (their brief, p. 51), is no answer, and cannot brush away the evidence as embodied in the bill of exceptions as contained in the record.

Two hypotheses are presented by the learned counsel for the United States, defendant in error (their brief, pp. 19, 36, 39, 51), the *first* that Herman Keck, plaintiff in error, and Captain Loesewitz both had an intention to violate the revenue laws, and the *second* that Captain Loesewitz was merely an innocent agency. On the second hypothesis it is asserted (their brief, p. 19), that there was no *locus poenitentiae* or opportunity for repentance or opportunity for change of intention. Conceding this as a premiss, for the sake of the argument, the conclusion contended for (their brief, p. 19), does not follow. If Captain Loesewitz were the mere innocent agency of Mr. Herman Keck, plaintiff in error, the mind of Mr. Herman Keck, plaintiff in error, would furnish the intent, and the overt acts of Captain Loesewitz would be the overt acts of Mr. Herman Keck, plaintiff in error. It would therefore follow that Mr. Herman Keck would be chargeable for his criminal intention, if any, *only so far* as such intention had been *executed by overt acts* on the part of Captain Loesewitz.

The question whether Mr. Herman Keck, plaintiff in error, being on the high seas on board the steamer Aller, and Captain Loesewitz, being on board the steamer Rhynland at Philadelphia, had an opportunity to repent, or op-

ortunity to change his intention, do not correctly present the question. The question is, assuming a criminal intention for the purposes of the argument, did the *overt acts* of Captain Loesewitz constitute smuggling? Smuggling means bringing ashore (our brief, pp. 9–12). The diamonds were not brought ashore, and, therefore, there was no crime of smuggling. *United States vs. Wiltberger* (1820), 5 Wheaton, 76, 95, 95–96, 96, 105; *United States vs. Chase* (1890), 135 U. S., 255, 261; *Sarlls vs. United States* (1894), 152 U. S., 570; *Swearingen vs. United States* (1896), 161 U. S., 446, 451; *France vs. United States* (1897), 164 U. S., 676, 682–683; Our Brief, pp. 21–25, 25–28.

If the court hold contrary to our contention (our brief, pp. 28–37), that the definition contained in the interpreting clause in Section 4 of the Anti-Moiety Act of June 22, 1874, (18 Stat., 186), is to be applied to the word smuggle contained in Section 19, of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 3082, Rev. Stat., the question presented is, assuming a criminal intention for the purpose of the argument, did the *overt acts* of Captain Loesewitz constitute an attempt to smuggle? We have shown that they do not. (Our brief, pp. 54–67.)

While a few steps across a gang-plank (their brief, p. 19), would have been *overt acts* of smuggling, yet those few steps were not taken. The step from mere immorality without crime to immorality as crime, is a short one, but until that step is actually taken, no such crime is committed.

If one be charged with the crime of larceny until he takes and carries away, the *overt acts* short of taking and carrying away do not constitute larceny, whatever else they might constitute. If one be charged with smuggling, and smuggling means to take on shore, and the overt acts fall short of taking on shore, there is no crime of smuggling. The answer to the argument of the learned counsel for the United States, defendant in error (their brief, p. 20), has already been given by us (our brief, p. 83).

(*d.*) *The facts do not constitute an attempt to smuggle according to the testimony of Captain Loesewitz.*

We have already discussed this (our brief, pp. 62–67), and the argument will not be repeated.

(*e.*) *Plaintiff in error, Mr. Herman Keck, cannot be charged in any higher degree or to any greater extent for the acts of Captain Loesewitz than if he had done them himself.*

We have already discussed this (*ante* pp. 38–39), and the argument will not be repeated.

VI.

Constructive Crimes.

(1.) Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text.—Post p. 40-41.

(2.) There are no constructive crimes, and before an act can be held to be within a statute it must be both in the letter and spirit of the law.—Post p. 41.

(3.) History, English legislation, Federal enactments, English decisions, American precedents, analogy, allied crimes, offenses, "so to speak," non-legal definitions, and debates in Congress cannot be used to build up or construct something as a crime not within the language of a statute. An act to be within a criminal statute must be within its letter and spirit.—Post p. 40-48.

(*a.*) *Claim of United States defendant in error.*

By history (their brief, pp. 15–20), English legislation (their brief, pp. 20–22), Federal enactments (their brief, pp. 23–27), English decisions (their brief, pp. 27–29), American

precedents (their brief, pp. 29–41), analogy (their brief, p. 34, allied crimes (their brief, pp. 7, 8), offense of smuggling, "so) to speak" (their brief, pp. 18, 33), non-legal definitions (their brief, pp. 10–12), and debates in Congress (their brief, pp. 44–47), the learned counsel for the United States, defendant in error, build up, or construct a crime and call it smuggling. Construction is thus defined in Lieber's Hermeneutics (Third Ed., 1880), 44:

"Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text."

From 1820 to 1898, both inclusive, this court has held that there were no constructive crimes (our brief, pp. 21–25), and that before any acts could be held to constitute a crime they must be *both* within *the letter and the spirit* of the law.

(*b.*) *English Legislation.*

Magna Charta, (9 Edw. III, Ch. 23, enacted in the year 1225; 1 Stat. at Large, 9), provided that—

"All wares henceforth shall be utterly put down by Thames and Medway and through all England, *but only by the sea coast.*"

In Part 12 Coke, 34–35; Vol. 6, Coke (Lond., 1826), p. 239, it is said:

"It appeared unto us also, that at the common law no custom was paid, but only for wools, wool-pelts, and leather, which is called in *Magna Charta recta consuetudo.*"

The act of 1 Elizabeth, Ch. 11 (1558, 6 Stat. at Large, 137–142), provided in Section 2 that it should be unlawful to put from the *wharf or a place on land* into a ship; or "*to take up, discharge, and lay on land*" from a vessel wares and

merchandise, except in the day-time. Section 3 provided for a forfeiture in case of violation of Section 2. An examination of this statute does not bear out the contention for which it was cited by the learned counsel for the United States, defendant in error (their brief, p. 20).

The act of 13 and 14 Charles II, Chap. 11 (1662; 18 Stat. at Large, 78–94), also speaks of putting merchandise *on land from a ship*, and regulates the same.

The act of July 1, 1816, being 56 George III, Ch. 104 (56 Stat. at L., 526), which is not cited by the learned counsel for the United States, is entitled "an act for making more effective provision for the *prevention* of smuggling," etc., and rewards the seizure of goods *unshipped* or *landed* without payment of duties, which accrued on importation.

The Act of July 15, 1820, being 1 George IV, Ch. 43 (60 Stat. at L., 174–187), is entitled "an act to *amend* the laws relating to smuggling and the coasting trade of Great Britain." It amplifies and adds to the common law and previous statutes, but substitutes no new definition for the common-law offense of smuggling.

The Act of July 5, 1825, being 6 George IV, Ch. 108 (65 Stat. at L., 740), is entitled "an act for the prevention of smuggling." The same can be said of this as of the former act.

The Act of August 28, 1833, being 3 and 4 William IV (73 Stat. at L., 408), Ch. 53, was an amendment of the former statute.

The Act of May 22, 1834, being 4 and 5 William IV, Ch. 13 (74 Stat. at L., 18), was an amendment of the previous statute.

The Act of August 4, 1845, being 8 and 9 Victoria, Ch. 87 (85 Stat. at L., 660), is an amendment of the two previous statutes, and as it was passed subsequent to Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), it could not have been in the mind of Congress at that time, and, besides, does not change the common-law definition of smuggling. The

same may be said of the Act of August 20, 1853, being 16 and 17 Victoria, Ch. 107 (93 Stat. at L., 718), and the Act of July 24, 1876, being 39 and 40 Victoria, Ch. 35 (Law Reports [Statutes], Vol. XI, 1876).

These numerous English Statutes only emphasize what we have already stated, that there is a common law offense of smuggling, as defined from 1716 to 1896, both inclusive, by Hawkins, Russell, Gabbet, Gilbert, and Bacon, and that August 30, 1842 (5 Stat., 548, 565), Congress adopted that definition as a part of the act, to all intents and purposes as if embodied in the text (*ante* pp. 5, 13), *United States vs. Smith* (1820), 5 Wheaton, 153, 160. With the growth of commerce, and, therefore, with the increase of motives for defrauding the revenue, the English Parliament kept pace by the frequent enactment of new and the amendment of old statutes. Neither the English Treasury nor the Attorney or Solicitor-General asked the Courts to construct a new crime, but resorted to the legislative body to enact new laws having a prospective operation. The policy of a government is to be determined *by the language it uses* in its legislative enactments. *Hadden vs. Collector* (1866), 5 Wallace, 107, 111–112; *St. Paul, etc., Ry. Co. vs. Philps* (1890, 137 U. S., 528, 533.

It was said in Stephen's General Views of the Criminal Law of England (2d Ed., 1890), 64, that—

"The common and statute law are mixed up in nearly equal proportions in our criminal law, and that nearly every part of it, though not to the same degree, is affected by each. It is also true that it is practically impossible to study the two apart. The statutes are unintelligible and a mere burden to the memory without the common law. The common law can be understood by itself, but unless it is studied in connection with the statutes it is, so to speak, disembodied and almost exclusively theoretical."

The frequent necessity for amending and supplementing statutes is well illustrated in 6 Bacon's Abridgement (Fifth Ed., 1798), 373, where he said:

"A statute can do no wrong, but it may do some things which seem very strange."

The statutes cited are all affirmative statutes, and the rule governing them is well settled. It is thus stated in 6 Bacon's Abridgment (5th Ed., 1798), 376:

"Some statutes are from their being in affirmative terms called affirmative statutes; others obtain the name of negative statutes because they are penned in negative terms. *It is a maxim of law that an affirmative statute does not take away the common law.*"

In *Arthur vs. Bokenham* (1708), 11 Modern Rep., 148, *Lord Chief Justice Trevor* said (p. 150) that:

"The general rule in exposition of all acts of Parliament is this: that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law in cases of that nature, for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare; therefore in all general matters the law presumes the Act did not intend to make any alteration, for if the Parliament had had that design they would have expressed it in the Act."

We had occasion in our brief (pp. 34–37) to discuss the opinion of *Mr. District Judge Benedict* in *United States vs. Claflin* (1875), 13 Blatchford, 178. A part of this opinion, cited by the learned counsel for The United States, defendant in error (their brief, p. 47), shows a reference to 16 and 17 Victoria, ch. 107, Sec. 244. It is to be kept in mind that *Mr. District Judge Benedict* did not have before him Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), but the Act of June 22, 1874 (18 Stat., 186). The English statute cited by him was passed August 20, 1853, eleven years after the passage of Sec. 19 of the Act of August 30, 1842, and the indictment, trial, and opinion in the *Claflin case* were in the year 1875, during the period that the first half of Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), punishing

smuggling, was inadvertently omitted from the Revised Statutes (our brief, pp. 6–8, 34–37; this brief, *ante*, pp. 2–5). The court was not interpreting or construing Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Revised Statutes, and, as we have already argued, the same words may have a different meaning in each statute wherein it is found (our brief, pp. 29–34).

(c.) *English decisions.*

A number of English decisions applying the English statutes have been cited by the learned counsel for the United States, defendant in error (their brief, pp. 27–29).

Wilson vs. Saunders (1797), 1 B. & P., 267, turned on the language of the Act of 11 and 12 Wm. III, chap. 10, Sec. 2. The learned counsel for the United States, defendant in error, do not correctly state the provisions of that statute, and the decision throws no light on the question in the case at bar.

Attorney General vs. Towns (1818), 6 Price, 198, turned on the Act of 17 Geo. III, c. 39, Sec. 25. It was admitted that the evidence established *overt acts* of *unshipping* the glass on *Essex coast.* The court submitted the question of *intent* to the jury. The jury having found that the *intent* was *unlawful*, and a motion for a new trial having been filed, led *Baron Graham* to say that the "very suspicious circumstances of the transaction warranted the verdict."

Lord Chief Baron Richards and *Barons Wood* and *Garrow* said the evidence sustained the verdict.

Attorney General vs. Tomsett (1835), 2 Crompt. M. & R., 170; 5 Tyrwhitt, 514, turned on the Act of 6 Geo. IV, c. 108, Sec. 45. The offense was that of *unshipping.* The *over acts* were *unshipping*, and there was a violation of the *English statute.* This throws no light on the offense of smuggling.

Attorney General vs. Robson (1850), 5 Exchequer, 790, turned on the Act of August 4, 1845, 8 and 9 Victoria, chap. 87, Sec. 46, punishing a person for the *statutory* offense of being concerned in illegal "*unshipping.*"

Attorney General vs. Catt (1837), 3 M. & W., 7, turned on the Act of August 28, 1833, 3 and 4 Wm. IV, ch. 53, Sec. 44, punishing a person for the *statutory* offense of "*unshipping.*"

(*d.*) *American legislation.*

The Act of July 4, 1789, (1 Stat., 24), was the first Federal statute levying a duty on imports, and until the passage of that act no frauds were possible on the Federal revenue derived from imports. There were no common-law crimes against the Federal Government, and statutes to protect the revenue were passed from time to time and various *sanctions* provided.

The Acts of July 4, 1789, July 31, 1789, September 16, 1789, August 4, 1790, March 3, 1791, March 2, 1793, June 5, 1794, June 7, 1794, January 29, 1795, February 26, 1795, March 3, 1795, May 27, 1796, June 1, 1796, June 1, 1796, March 3, 1797, December 1, 1797, March 2, 1799 (1 Stat., 24, 29–49, 69, 145–178, 219, 336, 378, 390–392, 411, 420–423, 426–432, 476, 492, 495, 502, 503, 509, 536, 627–704); May 10, 1800, May 13, 1800, March 26, 1804, March 27, 1804, April 21, 1806, February 25, 1813 (2 Stat., 72, 84–85, 291, 304, 399, 804); March 3, 1815, February 5, 1816, April 27, 1816, January 14, 1817, March 1, 1817, April 20, 1818, April 18, 1820, March 2, 1821, March 3, 1823 (3 Stat., 231, 253, 310, 344, 351, 433, 458, 460, 461, 563, 616, 781); January 7, 1824, March 2, 1827, May 19, 1828, July 14, 1832, March 2, 1833 (4 Stat., 2, 235, 270, 583, 635, 644) were a few early statutes levying duties, regulating their collection, and imposing forfeitures. Congress had the tariff question before it, consequently, but it was not until August 30, 1842 (5 Stat., 548, 565), that a statute (Sec. 19) punishing "smuggling" was passed. Changes in the methods of handling merchandise, grown up since August 30, 1842, will not justify a court in 1898 in building up or constructing a new legal meaning to a word having a fixed legal meaning at the date of the passage of the law (our brief, p. 9). The proper way

is to indict under a proper statute, if any, and if not, to procure *prospective* legislation.

(*e.*) *Federal decisions.*

The cases cited by the learned counsel for the United States, defendant in error, in their brief (pp. 29–38), range in time from 1824 to 1887, construe numerous different statutes, and each case rests upon the *language* of each statute. They protest too much that they are not begging the question (their brief, p. 33).

The word "smuggle" has a well-defined legal meaning (our brief, pp. 8–15, 21–25; *ante*, pp. 5–6, 11–13), and is to be understood as defined in the treatises on the common law (*United States vs. Palmer* (1818), 3 Wheaton, 610, 630, 640; *United States vs. Smith* (1820), 5 Wheaton, 153, 159–160; *United States vs. Davis* (1829), 5 Mason, 356, 362; *Swearingen vs. United States* (1896), 161 U. S., 446, 451).

The case of *United States vs. Hartwell* (1867), 6 Wallace, 385, does *not* hold that a word having a defined meaning at common law, when incorporated into a statute, shall not be given that meaning, and *United States vs. Smith* (1820), 5 Wheaton, 153, 159–160, directly holds that "*the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference the definitions are necessarily included as much as if they stood in the text of the Act.*"

IN CONCLUSION.

For the other points dwelt on by the learned counsel for the United States, defendant in error, we refer the court to pages 80–81, our brief (dated October 8, 1898), which gives the references to the Revised Brief (dated October 9, 1897). As to the suggestion as to a proper sentence, this court has no power to fix it at a year and a day.

This case involves not merely the liberty of a single cit-

izen, but the principle which separates arbitrary from free governments—justice ccording to law from justice according to the will of the magistrate in each concrete case presented. The definition at the common law is clear and certain and ought to be followed.

It is unbecoming to discuss the weight of the evidence, the inconsistency of the testimony of Captain Loesewitz with itself and the other evidence; but assuming, for the sake of argument, the strongest case the evidence presents against Mr. Herman Keck, plaintiff in error, the conviction ought to be set aside and plaintiff in error discharged.

Respectfully submitted.

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WASHINGTON, *November* 10, 1898.